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IN THE

Supreme Court of The United States

OCTOBER TERM, 1980

WESTERN AIR LINES, INC.
Petitioner,

vs.

INTERNATIONAL TRAVEL ARRANGERS, INC.
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONER'S REPLY BRIEF

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As shown in the Petition, the Eighth Circuit held that Western Air Lines, Inc. ("Western") violated the Sherman Act merely because its comparative advertising campaign against a new form of air travel competition was intended to be successful and was, in fact, successful. This holding perverts the Sherman Act by paralyzing competition and conflicts with all of the decisions rejecting such misuse of the antitrust laws. *See, e.g.,* cases cited at p.4 *infra.* International Travel Arrangers, Inc. ("ITA"), in its Brief In Opposition, is unable to cite any precedent for the decision below or defend the merits of the opinion. Instead, ITA devotes virtually all of its Brief to arguing (1) that the district court properly found that Western had used market leverage in the Minneapolis-Las Vegas market to discourage one travel agent from promoting Travel Group Charters ("TGC's") and (2) that Western's large share of the Minneapolis-Hawaii market somehow justifies the Eighth Cir-

cuit's novel decision.[1] As explained in the Petition at pp. 27-29, the first contention is both factually unsupportable and, more importantly, irrelevant to the question of whether certiorari is warranted. The second argument is simply incorrect legally.

I. THE DISTRICT COURT'S MARKET LEVERAGE HOLDING DOES NOT BY ITSELF SUPPORT THE JUDGMENT AND THUS DOES NOT MOOT THE PETITION.

The district court's market leverage holding does not by itself support the decision below. *See,* Petition, pp. 27-28. Although ITA spends several pages attempting to defend the district court's holding, ITA is unable to rebut the fact that the leverage holding, even if supportable, cannot by itself support the damages awarded against Western nor moot the major questions presented by the Petition.[2]

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1. ITA also implies in passing that Western did not raise the issue before the Court of Appeals of whether the "anti-TGC campaign" could constitute a violation of § 1 of the Sherman Act. Brief In Opp'n, p. 2. This was Western's "threshhold" argument, however, before the Court of Appeals. Brief of Appellant Western Air Lines, Inc., April 26, 1979, at pp. 22-29.

2. In fact, ITA is also unable to cite *any* evidence to support the district court's finding that Western threatened to cut off the Minnesota State Automobile Association ("MSAA") from its "Group 60" Las Vegas program if MSAA continued to promote TGCs. Like the Court of Appeals, ITA alludes only to evidence that Western enjoyed market leverage and that MSAA was "aware" of Western's leverage. Brief In Opp'n, p. 8. As to the critical September 25, 1973 meeting, both ITA and the Court of Appeals can cite only the testimony of Lynn Zumbrunnen, Western's regional director, that the "Group 60" program was discussed at the meeting. *Id.* But Zumbrunnen's testimony was that MSAA — not Western — brought up the "Group 60" program to remind Western that MSAA "had produced and sold many passengers to Las Vegas" for Western and that Western risked losing this MSAA patronage if it continued to advertise against TGCs. 18 Tr. 65. MSAA personnel at the meeting confirmed this account. 11 Tr. 77-78, 83, 185. There is *no* evidence in the record that Western threatened MSAA back. The validity of the district court's finding to the contrary is an issue that should clearly be considered on remand if this Court grants certiorari and reverses.

The "anti-TGC campaign" was at the center of both the district court's and the Court of Appeals' decisions. And there is no evidence that MSAA would have cancelled its ITA TGCs if there had not been a drop off in public interest attributable, according to the courts below, to Western's advertisement warning consumers of the dramatic drawbacks of TGCs. MSAA did not cancel its charters with ITA immediately after the September 25, 1973 meeting with Western, as it would have if Western's alleged threat had been the deterrent. Instead, it continued for several weeks to advertise the TGCs and to solicit customers to fill the charters. 10 Tr. 156-157, 178; 11 Tr. 97; Ex. 77. MSAA testified that it was ultimately forced to cancel the charters because of "lack of passengers" — not pressure from Western. 10 Tr. 177-178. Not surprisingly, therefore, there is no holding below that the alleged leverage, by itself, would have supported the damage award.

The district court's market leverage finding, in short, does not provide an alternative ground for affirming the decision below. The decision rests squarely on a perverse and novel reading of the Sherman Act that this Court should expunge.

II. WESTERN'S MARKET SHARE DOES NOT JUSTIFY THE DECISION BELOW

ITA appears to recognize that the Court of Appeals' decision does not rest on any inaccuracy or ambiguity in Western's ad but merely on the facts that Western engaged in its advertising campaign with the intent to prevail in the market and that the campaign was effective.[3] Apparently recognizing the weakness of this logic in a § 1 context, ITA attempts to justify the Court of Appeals' holding on the ground that Western held a large share of the Minneapolis-Hawaii market.

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3. ITA does not attempt to justify the Court of Appeals' decision on the basis of the district court's finding that Western's ad was in parts unintentionally inaccurate or misleading. Indeed, ITA expresses surprise that "so much of the Petition is devoted to trying to demonstrate the truthfulness of the September 16th ad." Brief In Opp'n, p. 16 n.19.

Contrary to ITA's argument that "any exclusionary conduct by one possessing monopoly power is proscribed by the antitrust laws,"[4] the courts have long recognized that a monopolist, like any other business, is free to compete vigorously even though in the process it maintains or expands its market share. *See, e.g., United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966); *Memorex Corp. v. IBM*, No. 78-3050 (9th Cir. Nov. 18, 1980), *aff'g* 458 F. Supp. 423 (N.D. Cal. 1978); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 273-75 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980); *California Computer Prods., Inc. v. IBM*, 613 F.2d 727, 735-36 (9th Cir. 1979); *E. I. DuPont de Nemours & Co.*, 3 Trade Reg. Rep. (CCH) ¶ 21,770 (F.T.C. Oct. 20, 1980); 3 P. Areeda & D. Turner, Antitrust Law 73-83 (1978). In particular, a monopolist is free to publicize the advantages of its products and the drawbacks of those of competitors unless the *amount* of advertising is "so unwarranted by competitive exigencies as to constitute an entry barrier." *Berkey Photo, supra*, 603 F.2d at 287, *citing American Tobacco Co. v. United States*, 328 U.S. 781, 797 (1946). No court has ever condemned an advertisement under either § 1 or § 2 of the Sherman Act because of the competitive purpose of its sponsor, until the Eighth Circuit in this case.

Western's "anti-TGC campaign" consisted solely of one newspaper advertisement, several radio spots and a letter to Minnesota travel agents warning of the serious drawbacks of TGCs. The "anti-TGC campaign" did not involve any abuse of market power and neither the district court nor the Court of Appeals so found.[5] The Eighth Circuit

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4. Brief In Opp'n, p. 10.

5. ITA implies at one point that Western's letter to Minnesota travel agents constituted a veiled threat to use leverage in the Minneapolis-Las Vegas market to punish agents promoting TGCs. Brief in Opp'n, p. 13-14. There is no evidence to support this assertion. Both the district court and the Court of Appeals found that the letter was merely what it was intended to be — an informative letter drawing travel agents' attention to what Western viewed as the drawbacks of TGCs. App. 9a, 15a, 8d-9d.

condemned the "campaign" merely because it was a "full frontal attack" on TGCs engaged in with competitive intent. The absurdity of the Eighth Circuit's decision is demonstrated by the bottom line of ITA's argument — that a company with market power cannot advertise with the intent to maintain or expand its sales.

III. THE EIGHTH CIRCUIT'S DECISION CONFLICTS WITH *BERKEY PHOTO*

ITA makes absolutely no attempt to distinguish most of the contrary precedents cited in the Petition. In a footnote, however, ITA attempts to distinguish *Berkey Photo, supra,* on several minor factual grounds, none of which go to either the logic or holding of *Berkey.* Brief In Opp'n, p.14 n.14. In particular, ITA contends that *Berkey* is irrelevant because Western "disparaged competition rather than bathing [its own] product in its best light."[6] *Id.* As elaborated in the treatise upon which *Berkey* relies, however, criticism of a rival's product should no more constitute a Sherman Act violation than promotion of one's own product, even when the criticism is assertedly false:

> "[D]istinguishing false statements [about rivals] . . . from customary puffing is not easy. Even at common law, this is 'a tort that never has been greatly favored.' More importantly, the effects upon a rival would usually be very speculative, especially when disparagement is not systematic. Many buyers, moreover, recognize disparagement as non-objective and highly biased. Although hardly a justification for falsehood, buyer distrust of a seller's disparaging comments about a rival seller should caution us against attaching much weight to isolated examples of disparagement. Essential, therefore, is a

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6. ITA also suggests that *Berkey* is distinguishable because Western's advertising "had a demonstrated *substantial* adverse effect" on competitors. Brief In Opp'n, p. 14 n.14 (emphasis in original). Kodak's advertising, however, had a very substantial adverse effect on the business of its competitors. 603 F.2d at 278 & 287. The Second Circuit refused to hold that Kodak's advertising violated the Sherman Act because there was no showing that the alleged *misrepresentations* had more than a *de minimis* effect on competition. *Id.* at 288 n.41.

> serious de minimis test. We would go further and suggest that such claims should presumptively be ignored." 3 P. Areeda & D. Turner, *Antitrust Law* 280-81 (1978).

See also Associated Radio Service Co. v. Page Airways, Inc., 624 F.2d 1342, 1354 (5th Cir. 1980), citing Areeda and Turner's conclusion that "mere misrepresentations of one's own or a rival's product" normally do not make out a § 2 violation.

IV. CONCLUSION

For these reasons, and for the reasons expressed in the Petition, petitioner again prays that a Writ of Certiorari issue to review the judgment and opinion of the Eighth Circuit in this case and restore advertising as a valid means of healthy competition.

Respectfully submitted,

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